UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE REGULATORY FUNDAMENTALS GROUP LLC,

Plaintiff,

v. 13 CV 2493 (KBF)

GOVERNANCE RISK MANAGEMENT COMPLIANCE, LLC, et al.,

Defendants.

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New York, N.Y.
June 25, 2014
10:00 a.m.

Before:

HON. KATHERINE B. FORREST,

District Judge

APPEARANCES

SPEARS & IMES
Attorneys for Plaintiff
BY: DAVID SPEARS

AHMAD NAQUI RODRIGUEZ, LLP
Attorneys for Defendants
BY: HYDER NAQUI

(Case called)

THE COURT: Good morning. We're here for oral argument on plaintiff's motion relating to spoliation, and I think that's the only item on the agenda. We had otherwise closed the evidentiary record subsequent to our last hearing. There was an agreement by the defendant to waive the attorney/client privilege in the limited manner in which the Court had described on the transcript at the last hearing, and the transcript should have been unsealed.

And Mr. Spears, you should have received a copy of it or been able to, I should say, get a copy of it of the unsealed portion. Were you able to?

MR. SPEARS: Yes, I was. Thank you very much.

THE COURT: Terrific. So if there's nothing else in terms of evidentiary matters, we should go ahead straight into the argument. And Mr. Spears, since it's your motion, I will let you go ahead and begin.

MR. SPEARS: Thank you. Your Honor, as a preliminary matter I would like to hand up to the Court four demonstrative exhibits that are, in effect, timelines that capture different pieces of what I'm going to be arguing about. I request that these be marked for the record as 22, 23, 24 and 25, and I intend to refer to them during my summation.

THE COURT: All right.

MR. SPEARS: And I provided those to counsel

yesterday. We made one change after they were provided to him, I just gave him a revised copy that had that one change on them.

THE COURT: All right. So Mr. Naqui, I take it that's an accurate representation, you have seen these?

MR. NAQUI: That is an accurate representation, your Honor, I have seen them. My only slight objection to them would be to the extent that some of these timeline entries summarize testimony or anything like that, that testimony, along with what was presented to the Court in the hearing a couple weeks ago, is on the record and in and of itself, to the extent these characterize the testimony in some way, I object to that.

THE COURT: Understood. The testimony is the evidence in the case, and that is reflected in the transcript.

Similarly, the quotations from the documents, the documents that have been previously admitted as part of the evidentiary record are the evidence, but the Court will use these as a demonstrative to the extent they go to these matters.

You made proceed, Mr. Spears.

MR. SPEARS: Thank you, your Honor. There are two distinct pieces to this case in terms of our perspective in terms of spoliation. One is the manual deletion of emails by Mr. Wood, and the other is the termination of the account at

MacHighway. And the demonstratives actually have do with the MacHighway issue. I'm going to start with the deletion, the manual deletion of the emails, and address that. I do not have a demonstrative for that, but it's not lengthy, what I have to say isn't lengthy.

Mr. Wood testified in this hearing, on the June 10 hearing, consistent with his deposition testimony that after he received the cease and desist order and after he received the May 17, 2013 letter from our firm to the Court complaining about ongoing hits to RFG's Web site, and after his June 3, 2013 deposition, he manually deleted emails, that is, when I refer to transcript, I will be refer to the June 10 transcript that is transcript page 36. What he deleted was the sent emails that he had sent to recipients containing RFG copyrighted material that he had created infringing copies of. He estimated that there were 10 to 20 of those emails that he sent to recipients. That is at transcript 36 to 37.

Those sent emails had a distribution list in the BCC field of 400 to 500 recipients who were on his distribution list. That is at transcript 38 to 39. He deleted those sent emails from his sent box over a period of time. In particular, after his deposition on June 3, 2013, he went back and deleted more, that is at transcript 42 to 43. And at the time of the deposition, on June 3, 2013, he was aware of the May 31, 2013 document request from plaintiff. That is at transcript 48.

When he deleted the emails from his sent box with the distribution list in the BCC field, he double deleted those emails. He has testified that the purpose of this exercise in deletion was to remove all possibility of any further accusation that he was the cause of any hits that RFG was experiencing to its Web site were linked to the copyrighted material that it had sent to them that had links in it. That is at transcript 42 to 43 and 50.

Your Honor, we believe that is simply not credible and should be rejected as not credible for the following reasons, among others: A, he never told his counsel that he had deleted these emails from his sent box in order to protect himself against accusations of being responsible for these hits. If his purpose was to insulate himself from such accusations, he should have announced it so as to remove all doubt that any further hits were from him. It's also incredible because deleting the emails with the links in them from his sent box would not affect those same emails in the hands of the 400 to 500 people on his distribution list. It would have no affect on that.

Similarly, deleting those emails from his sent box would not affect the same emails as they existed in his inbox. He said that he copied himself on his distribution list in the CC field, BCC field, so that he had a copy of the email too, and to the extent that that email existed in his inbox, he

would still be subject to the same accusation, if one credits his logic. He also testified that he had trouble understanding why those emails in the sent box would even be relevant, and why it wouldn't be okay to delete them because he had been transparent in the litigation about what he had done and that was something he received from RFG, so they already knew about it.

I mean that is not only inconsistent with any sort of expression of remorse or regret, it's sort of a double down and saying actually I am not sure there was anything wrong with this because these emails weren't relevant.

The only possible purpose of the deletions was to get rid of all evidence of the persons and entities to whom he had sent the infringing copies of plaintiff's copyrighted material. And we submit to the Court that there can be no other inference drawn as to why those emails were deleted.

THE COURT: And let me ask, do you know whether or not the entity's names were included on the BCC, through some form of manual entry into the BCC line or whether there was a group function that was used to distribute them? Because if it was a group function, then presumably on the computer there would still be the group. And so while you might not have the emails, you might nonetheless have the names, at least the email addresses of the group.

MR. SPEARS: I do not know the answer to that, your

Honor. I know that there have been discussions about getting the distribution list that he presently has. We cooled on that idea because at this point we're not willing to take Mr. Wood's word for what was and was not on that distribution list as reflected in the BCC field. And it strikes us as counterintuitive that he would have deleted all that and then be willing to provide us with a complete list of those names.

THE COURT: I think in addition from the testimony, Mr. Naqui will have an opportunity to address all of this, the 10 to 20 emails were the group emails, if you will, they did not include, as I understood Mr. Wood's testimony, the individualized back and forth that might have been triggered by an addressee's receipt of an email.

So for instance, if somebody said I would like to get together with you for a meeting or luncheon, and he wrote back and said terrific, I will be around on X day, that kind of communication wouldn't necessarily -- would not be within the 10 to 20, it would be a different communication, but it would have been within the group of emails that were deleted.

MR. SPEARS: I believe that's right. And I believe further, your Honor, if they weren't manually deleted, they were lost for all time when he terminated the MacHighway account where presumably any such emails that had not been deleted would have been in an inbox, a deleted folder file, or a sent folder. So we know what he manually deleted to some

extent because he told us. If he didn't delete the back and forth with any back and forth people manually, then it was lost forever when he terminated the MacHighway account.

And it seems to us, your Honor, there could be replies such as "I'm interested, let's get together," there could have been replies such as "I'm marketing this for you, I'm working with you on this, I have interest from people," we would know nothing about those. They could reflect -- emails that we won't have access to could reflect communications about the actual receipt of revenue. Mr. Wood testified that he did not receive revenue, but we're simply not willing to take his word about that.

I also note that the emails and the distribution list as actually sent are of enormous interest to us, because it could have had a negative impact on plaintiff, namely if they were -- if their actual customers got it, were on the distribution list, the customers could have said: Why am I paying RFG for this stuff when I could get it apparently from Manhattan Advisers from Mr. Wood for free? Or potential RFG customers may have had the same reaction, or potential or actual customers may have thought to themselves, well, RFG represented to me they have this very special proprietary product that they invested a lot of time and effort in creating, but it looks like it's all over the place, other people have the same material and maybe they're not telling us

the whole story about their product and what it is we're paying a subscription for.

THE COURT: All right.

MR. SPEARS: Your Honor, I would like to go on to the MacHighway and to refer the Court respectfully to the demonstratives. Demonstrative Exhibit 22 is a one-page exhibit with the heading: Greg Wood Canceled MacHighway Accounts.

THE COURT: I have it in front of me.

MR. SPEARS: So January 23 we had oral argument on the summary judgment motion. On January 27 Mr. Wood reset his MacHighway password after multiple attempts at logging in. That's in the MacHighway log. On January 28 plaintiff's counsel emailed defendant's counsel attaching the May 31, 2013 document request and noting that, based on the oral argument and your Honor's comments at the oral argument, we would expect to receive production pursuant to those shortly after the Court's ruling.

On February 2, 2014, Mr. Wood received a renewal notice from MacHighway for roxboroughwood.com, a different email account that he maintained with a lawyer colleague named Claude Roxborough. He responded to MacHighway not to renew the account, and we see that on the log, and I want to go to the log in just a minute. On February 3 the Court issued the order denying defendant's motion for summary judgment.

And I would like to go to the log at Exhibit 10. And

we gave the Court a binder of the exhibits, and I have given it to counsel for the defendants as well.

THE COURT: Yes.

MR. SPEARS: There was a little bit of confusion about this in the testimony, Mr. Wood's testimony at the hearing, and I would like to use this opportunity to try to clear that up.

If you go to February 2, 2014, not quite halfway up the page, you see created invoice, 27200. If you look further up, you can see that that relates to the Roxborough Wood account. So it appears that on February 3, a couple of lines up, Mr. Wood went into that account on MacHighway's servers and canceled the Roxborough Wood service immediately.

Then you see the next line up, it's cancel outstanding product renewal invoice. That's for the hosting service, the email hosting service.

Then you go one line up, client disabled auto renew. That's for the domain preservation or maintenance. And you see here emails sent to Greg Wood, cancellation request confirmation, that's on 2/3.

On February 4 Mr. Wood went into -- if you go about four or five lines up, February 4 at 11:13, went into the Manhattan Advisers account and did an automatic cancellation requested immediately. So that is a cancellation of its account, and at the same time, he disabled the domain auto renew from Manhattan Advisers. So he cleaned the table with

regard to Manhattan Advisers as reflected here. An email was sent to him, it says here, cancellation request confirmation. And if you go up to 2/5/14, the next day at 2:49 it says module terminates successful with a service ID 16796. That's the same one as the lines below for Manhattan Advisers.

So this has him going in on the February 4, one day after the summary judgment ruling was issued, and terminating the Manhattan Advisers account, MacHighway. Future renew, the hosting service like automatic cancel, right now, and it was scheduled the hosting package was scheduled to terminate on April 16, 2014, that's reflected in other documents that I will go over with the Court. So he was in the prepaid period, and he affirmatively canceled.

He has said that the reason why -- first he said that he did that in January, not February 4, and he has challenged MacHighway's log, computer-generated log, which shows that it was on February 4. So in his testimony he actually testified that leaving aside the January -- the claim of January cancellation that the way it worked was that he got the Roxborough Wood auto renew, which we can see is February 2, so it reminded him about the Manhattan Advisers account, and he went in after he got the Roxborough Wood notice and canceled the Manhattan Advisers account. So that happened, the Roxborough Wood events around February 2 and 3, and the Manhattan Advisers events are on February 4 right after, so

that's consistent with his testimony.

He also testified that he's actually not sure when he deleted the Manhattan Advisers account on Roxborough Wood, and I will get that transcript cite and put it on the record. I thought I jotted it down here, but I didn't.

So all of that establishes that he canceled this the day after the summary judgment decision came down. It's our position that his testimony at his deposition on March 24, 2014, that he did it in early January, which was before we -- March 24, 2013 was before we had the Manhattan Advisers materials. And we got them and they show what they show. He testified, your Honor, that the purpose for terminating the Manhattan Advisers account was that he was applying for jobs, and he didn't want employers to see evidence of another Web site associated with him that he supposedly wasn't involved with anymore.

I note, your Honor, that in the materials we received from MacHighway -- Exhibit, the production by MacHighway to defendants, Exhibit 19, and Mr. Wood's telephone and email production reflecting his interactions with MacHighway, that's Exhibit 21. We see that in April he started anew right around the time when the Manhattan Advisers account burned out for the second time. He opened a new domain and email hosting service with MacHighway for something called the start-up survivor. So I think your Honor, that the fact that he opened another domain

and another account at the same time when he claims to have been shutting everything down because he was walking away from all those other businesses or presences and starting -- looking for a job somewhere else is simply not credible.

THE COURT: Can you show me where the start up survivor domain is referred to?

MR. SPEARS: Yes, if you go to Exhibit 10, it's first reflected here about April 12. You see new order placed with an order ID number, and then there are a series of entries here about --

THE COURT: I see.

MR. SPEARS: -- invoice payment, and created invoice with a number, continues module creates successful email sent to Greg Wood, credit card payment confirmation. And if you go to the emails with Mr. Wood, between Mr. Wood and MacHighway in Exhibit 21 that he produced on I think June 6, I think one of the last emails in that pack of materials produced, they sua sponte terminated that account with him and just said we're shutting it down, we'll put a credit on your credit card, and there's a reference there to starting up survivor.com account.

In addition, your Honor, I would like to call the Court's attention to Exhibit -- the next MacHighway production, which I think is Exhibit 14. If you go to the back page of that, your Honor, the very last page, I think it says page 11 of 11 at the top. So this is actually the screen shot that was

preserved when Mr. Wood canceled the Manhattan Advisers account. You can see here it has a date on here, at the top it says disusage right under cancellation request notice. It says last updated 02/04/2014 at 2:01. That's consistent with the cancellation request. The product of service it says "small," which is a reference to a particular hosting package option. It has registration date over at the right in a box, it has next due date, April 17, 2014. Status, down on the left under password "canceled," that's the option he checked in the box. And if you go down to towards the bottom it says "override auto suspend, do not suspend until," and you can see it's 00/00/0000, which means immediate. So this is actually a screen shot of the screen that he went to to cancel the account and the information that was entered on the screen at that time.

THE COURT: All right. I see that.

MR. SPEARS: So your Honor, I would like to go to Demonstrative Exhibit 23, which has the heading evidence regarding Greg Wood's destruction of emails at MacHighway and his efforts to restore. And the phone records which we received from Mr. Wood, which are in Exhibit 21, we see that Mr. Wood had a 37-minute telephone call with MacHighway on February 19, 2014, which would have been from 12:41 p.m. Eastern Standard Time to 1:18 p.m. Eastern Standard Time, then you see the corresponding Mountain Standard Time. And then at

11:18 Mountain Standard Time, which is when that call would have ended, there's a MacHighway log entry regarding the telephone call from Mr. Wood to MacHighway, and I would like to direct the Court's attention to Exhibit 19.

THE COURT: So I'm clear, this is to address the point that there was not only this phone call, but that there was not a different phone call?

MR. SPEARS: As to our position that there was not a different phone call, we note that there is no evidence of a different phone call. It's a question of proving a negative. And I simply rely on the absence of evidence -- contrary evidence in that regard.

THE COURT: Right. Understood.

MR. SPEARS: So this log, your Honor, entry was made at the time when that call ended, and it says customer called because he closed a domain a few days ago and realized the email is sitting on the server. I let him know that if the account was deleted, then so would the emails. I got him to go to -- et cetera, et cetera.

So if you follow down, your Honor, it says that Claude called in, that's Claude Roxborough, I believe, and if you read further it appears that this is about the Roxborough Wood hosting package and domain that had been terminated, and apparently Mr. Roxborough wanted to take it, but it's clear the top entry is Mr. Wood, and refers to a topic of conversation in

the 37-minute telephone call that he had with him that night. And we interpret this, your Honor, and we ask the Court to interpret it to mean that he called up and asked whether, notwithstanding the fact that he had terminated the account, the emails were still on the account, and he was told by MacHighway no, if the account was deleted, then so were the emails. So to us it suggests a concern that the emails might be in existence even though he terminated a particular account at MacHighway and he was calling seeking reassurance on that.

Then proceeding through the demonstrative, there are a series of entries here that relate to back and forth between plaintiff's counsel and Ms. Gates about defendant's imminent document production, and entries from the privileged log that indicates there were a series of communications between Ms. Gates and Mr. Wood on the topic of documents. These are privileged, but you can see sort of the momentum going here is we're pressing for the documents.

March 5, on page 2, plaintiff's counsel emailed saying that we have to have the emails or know what happened to them before we can proceed with settlement discussions. March 5, there's a telephone conference between plaintiff's counsel and defendant's counsel regarding the explanation for the missing emails. Then on March 7, 2014, plaintiff's counsel emailed notices of deposition for each defendant to defendant's counsel with a March 12, 2014 date.

We then see that there are a series of emails between MacHighway and Mr. Wood that are reflected in Plaintiff's Exhibit 14. It starts on page 5 of 11 at the bottom, right above the edit and delete box. And it says posted on Saturday, the 8th of March, at 9:51 I think it says. Mr. Wood says, "I deleted my domain, manhattanadvisers.com, in January and my email disappeared. If there's any way to get the emails back from my account from a back up, I need them desperately and will be glad to pay you for your time. Please get the emails back on" -- I note there it says "January."

It's our position that at this point in time Mr. Wood is attempting to make a record in support of the position he's going to take that all this happened in January. And I will come back to that later, because there are four instances at least where that happened, and I want to discuss those separately. A short while later he says, "To clarify, I need the historic emails, please help me."

If you go -- so then you go over to the very bottom of the next page where MacHighway says, "Thank you for contacting support. We keep only daily backups, so if this was deleted any more than a day ago, any backups would be gone."

About halfway up the page, right above the edit and delete boxes, Mr. Wood says, "Is there anything you can do? I'm desperate."

Then you go up a few lines further up and next to the

edit and delete boxes MacHighway says, "Hello, Greg, I'm sorry the loss of your email, but unfortunately if the daily backup is not sufficient, we would not be able to provide a backup to restore them," and they provide some information about how you restore a daily back up.

If you go to the next page, towards the bottom of the page -- sorry, your Honor, go forward a page, we're working chronologically here. So it's page 3 of 11.

THE COURT: 3 of 11, all right.

MR. SPEARS: Down at the bottom Mr. Wood says right above the edit and delete boxes on the bottom, "Thank you, but I closed the domain, that would not apply. Do you have a historic back up?"

Then you go up to the next edit delete boxes, and MacHighway replies, "Thank you for your reply. Unfortunately no, we do not have a backup of your account in any form. If your account was still active you could access the one daily back up that is provided through the C panel. However, please keep in mind that you, the customer, are responsible to keep backup of your Web site as stated in the terms and conditions."Then there's more information about a backup service that they provide.

So your Honor, those are the discussions on March 31, and I will come back to page 2 of 11 a little later, but Mr. Wood was told on March 8 there's no possibility of

restoring the emails because they were -- when the account was terminated, the emails were deleted, and he described himself as desperate to get the emails. And in the testimony at the hearing Mr. Wood testified that he was desperate because -- he used the word "desperate" because he was desperate to the settle, and he thought he could not settle the matter until he produced the emails, and he testified that he tried to settle from the beginning and he didn't have the money to fight this action and he just wanted to bring it to an end.

Well, I note, your Honor, that the record of the proceeding is completely inconsistent with that. I mean Mr. Wood filed a motion to dismiss, which is a party's right, obviously, from as soon as he came into the case, did not introduce documents. We had that June 20 hearing, our conference with the Court where the Court brokered a compromise where we would get some documents for three different recipients, but otherwise they resisted document production. They filed a motion to dismiss, which Mr. Wood attached an affidavit proclaiming his total innocence and claiming that this was all spurious and he had done nothing wrong, and that was converted to a summary judgment motion, as the Court knows. And again, he submitted an affidavit submitting that -- he submitted an affidavit arguing that he had done nothing wrong and his conduct has been lawful and proper at all times. And he actually sought a finding from the Court that plaintiff had

to pay his legal fees. So it is simply not true that he just wanted to settle this from the time started.

And I say all that by way of making the point that he was not desperate on March 8 because he wanted the emails to settle. He was desperate because he had gotten a deposition notice on March 7 calling for his deposition on March 12, pursuant to a ruling -- sorry, that was before the Court intervened on this and he was desperate to try to unwind from the wholesale document destruction he had worked at MacHighway when he terminated the account on February 4.

Your Honor, I would like to go to our next demonstrative, which is Demonstrative Exhibit 24, and this relates to Mr. Wood's actions following the March 12 deposition -- March 24, 2014 deposition. At that deposition Mr. Wood testified that -- we have it summarized here, and I know the Court has deposition transcript cites, and we tried to be faithful to the text, and I know that if we have erred or strayed, that will be recognized.

He testified at his deposition that he could not open and read the content of the emails that he had downloaded onto his personal computer from the manhattanadvisers.com account at MacHighway before he terminated the account. In other words, he said I downloaded them but can't open them, I can't understand. He said that he had been in contact with MacHighway about that issue since February and that he emailed

MacHighway about it on March 23. He further testified that he exchanged a total of five emails with MacHighway about this problem. If fact, your Honor, we see, if you go back to the log, Exhibit 14, the first page, Mr. Wood says above the edit and delete box on the bottom.

THE COURT: What exhibit?

MR. SPEARS: Exhibit 14, page 2 of 11.

This is the day after his deposition on March -- sorry, June -- March 24. He says, "Can you explain how it is that I can see my emails in my Microsoft Outlook but I can't read the actual content of the messages? Also do you know any way in which the content of the emails can be retrieved?" So he testified at his deposition that he had -- what he had downloaded was on his computer but there was something wrong with it since he terminated and he couldn't open it, and he had been in contact with MacHighway about that since February, had exchanged as many as five emails about it. But in fact there's no record that he ever mentioned that issue to them until the day after his deposition when he provided that alibi, if you will, for not producing documents. There are no prior emails with MacHighway about this, he never raised it at all with them until this time.

Afterwards there is a flurry of activities, and if the Court goes to Exhibit 10 again, the Manhattan Advisers log, you can see here it's on -- if you flip through to what's the

second page in that physical exhibit, you see a whole series of entries on March 31.

THE COURT: Yes.

MR. SPEARS: So it indicates that he was in contact with MacHighway numerous times on that occasion, on that date, and you see these entries over to the right referring to Amanda M, these more or less correspond to about five or six telephone calls reflected to MacHighway on March 31. What we do know happened is that the account was reactivated on March 31, because it was still in the prepaid period.

And you see here March 31, 1724, email sent to Greg Wood, "Your password has been reset." So there is a series of entries after that reflecting that -- there is one here, 1748, "Status change from canceled to active, password change." Then there's an interesting one up here, 3/31/14, four lines down, "Automatic cancellation requested for end of current cycle." So he reactivated, but he asked that the account be canceled as of the end of the cycle, which we saw in the screen shot that was April 17, 2014. So he reactivated the account with the proviso that it be canceled at the end of the prepaid period.

His testimony -- you don't have to go there now, your Honor, but we recorded it here on the second page of this demonstrative exhibit, 8:02 there's a three-minute call from him to MacHighway, 8:04 there's a -- MacHighway emails Mr. Wood transmitting account information, at 8:07 p.m. there's a

telephone call from Mr. Wood --

THE COURT: This is in --

MR. SPEARS: Demonstrative exhibit, your Honor.

THE COURT: I see.

MR. SPEARS: We summarized it there.

THE COURT: I see.

MR. SPEARS: So 8:43, a four-minute call from Mr. Wood to MacHighway, 8:48 a one-minute call from Mr. Wood to MacHighway. And he has testified, your Honor, that he spoke to someone there who quickly restored the emails that had been deleted when he terminated the account on February 4, 2014.

So this is March 31, about seven week later, on March -- on February 17 in a phone call he was told once these are deleted there's no getting them back, it happens when you close the account.

On March 8 he had the extended email chain where he said I'm desperate, I need you to restore these emails. He's told it's not possible to do that, they're gone. But he claims on March 31, someone on the phone, they can't say who, quickly restored the emails, and there they were, the emails that had been lost presumably when he terminated the account seven weeks before.

Your Honor, we argue that there is simply no inference to be drawn other than the inference that he uploaded materials at this time, that he reactivated the account and uploaded

materials. It gets pretty confusing in the testimony as to what happened there. I mean he testifies that they restored Justin Cho but not his. Frankly I wish I could be more help, but I have trouble following it. He testifies at the transcript of the June 10 hearing, 94 basically through 99, that somehow they managed to restore a manhattanadvisers.com user named Justin Cho's email but not Mr. Wood's. Mr. Cho had a lot of emails that would be relevant to this proceeding because Mr. Wood had sometimes copied him on emails that he sent, but he didn't copy him on everything that he sent, so it's partial.

Your Honor asked some questions: So the world as it existed before was not restored? And he said: That's right, it was a partial restoration, just Justin Cho -- I think that's what he said -- and no explanation of why they could restore Justin Cho and why they couldn't restore Mr. Wood's. I represent to the Court that if it's Justin Cho's emails that provided the source then he must have uploaded Justin Cho's emails.

MacHighway has said over and over again in emails, in their -- in the emails that we see in the computerized documents they produced, in responses to document requests that under the exhibit list, they're very short responses in a sworn statement by the president of MacHighway, in email exchanges they had with plaintiff's and defendant's counsel, that when an

account is terminated, they overwrite the data on that account immediately, and within a day or two it's gone, no exceptions, it can never be restored.

I mean they said that. These documents are in evidence. There is simply no hole in that representation by them. They said it back when he was interacting with customer support. They said it in sworn filings that were presented for use in this proceeding. They said it in responses to document requests. No exceptions, when we terminate an account, everything is overwritten. They just don't keep it around on their servers for someone to come back later. They get rid of it. There can't be any dispute about that, your Honor. And there's nothing in the record to support the argument that MacHighway managed to restore these emails.

After the March 31 reactivation, Mr. Wood informs Mr. Saleem that the material has been restored, gives Mr. Saleem access to the Manhattan Advisers account on MacHighway, and Mr. Saleem did a search for documents and finds documents that are produced.

So I am not suggesting anything improper on the part of Mr. Saleem. I believe him when he says that he went to the Web site and found those documents and produced what he did. I have a little bit of disagreement about the first production versus the follow-up production when we complain the first production was incomplete. But I have no question that he was

acting in good faith at all time, and I am not making any kind of accusation against him.

Mr. Wood testified I told Mr. Saleem they had been restored and gave him access to the account at the Manhattan Advisers account, so I think that in a sense Mr. Saleem became an unwitting player in all of this by being put in the position where he could and did argue they were restored because I went to Manhattan Advisers account at MacHighway myself and found these emails there.

I would like to refer the Court to the Demonstrative Exhibit 25. This is focuses in large part on materials we received from Mr. Wood in the production he made after the June 10 hearing and I think it sheds light on his intent and his credibility on certain representations that he made. It says manhattanadvisers.com account terminated for good. So April 17, the manhattanadvisers.com account at MacHighway expired, and that is pursuant to a March 31, 2014 automatic cancellation request that Mr. Wood made to Amanda, and it's reflected in the log, Exhibit 10, on March 31.

On May 2 we filed our motion for spoliation sanctions, and on May 5 Mr. Wood emailed MacHighway. These are in the emails that he produced, Exhibit 21, "I cannot access the C panel, please advise." MacHighway emailed Mr. Wood, "We are showing that the account was canceled, so unfortunately there's no C panel to log into." Mr. Wood emails MacHighway, "That's

not the case. This account is involved in litigation and it needs to be turned on now. I am copying my attorney. This need to be escalated immediately."

Short while later, MacHighway emails Mr. Wood, "This account was canceled on 2/14/14" -- that should be 4, we have a sic there -- "by someone logging into your billing area with the correct credentials at the time. The account is gone per your request and has been since that time."

Mr. Wood emails MacHighway an email communication he had on April 9 saying, "This was on in April showing that the account was on and should still be on." And then the next page 7:00 p.m. he emails MacHighway, "I just sent an email showing that the account and email were accessible in April, please escalate this immediately. Your company has destroyed email involved in litigation. That's serious matter."

So you go to the next entry, and it's from the president of MacHighway who also gave us a verified statement, he replies to Mr. Wood, "If you are referring to the account for manhattanadvisers.com, that hosting package was terminated on our servers on 2/5/14 as per client request." If you look at the log, it was May 5 that there's an entry saying the termination has been accomplished. "That means that on that date, all client data under the hosting package manhattanadvisers.com was deleted, including but not limited to Web site files, email messages, and all client access removed,

including, but not limited to, Web site and email accounts. That hosting package and any associated data has not existed since then."

Mr. Wood goes back forwarding another communication, email communication from the Manhattan Advisers account on April 9, "More evidence, please confirm." He goes back with another email, "The account was up and running in April, why was it turned off?" A short while later Mr. Wood from MacHighway, "This was turned off after you had notice of pending litigation. My attorney will be in touch to sort this out tomorrow. I hate to find out that you turned off the account to make your submitted statements true." Finally one more a few minutes later where he says -- protests his shock this happened and says towards the end, "Don't tell me you can't help me. Destroying evidence in an impending litigation is a serious matter."

So among other things, your Honor, this email exchange confirms that, by that point, at least, Mr. Wood got the message that you can't destroy emails while there's a litigation pending. That certain rings hollow that he would be making such an argument to MacHighway after the log shows when he reactivated the account on March 31 he gave direction it should terminated automatically on April 16 and that it should not be renewed.

So your Honor, if those materials were still there --

we don't want to go to the expense, but if those materials were still there one might be able to do metadata forensics on them to see last -- whatever is there, I'm a little rusty on this.

THE COURT: But the suggestion, I think what you're saying is that -- let me see if I have the story right, in terms of the metadata and how it would fit in.

On March 31 he reestablishes the account, he uploads certain e-mails, and set it to terminate in April. Meanwhile, he asks the lawyer go ahead and log into the account, it's good to go. The lawyer does so and downloads what has been uploaded, but meanwhile the automatic expiration that he previously put in place destroys any metadata evidence that would have revealed the data uploaded or anything else.

MR. SPEARS: Yes.

THE COURT: I hear your theory.

MR. SPEARS: So let me say that I mentioned that he has engaged in a number of record-making exercises in connection with all of these events, and I just want to go over four that sort of stand out.

The first is on March 8, 2014, he has an email to MacHighway in Exhibit 14 that says I deleted this domain in January. And that's not true. MacHighway's own records, computer-generated records, show that he deleted the domain on February 4. And he subsequently testified on March 24, 2014, after this March 8 email exchange, that he deleted the domain

in January, deleted the account in January. So he's already building a record for this I-deleted-in-January argument, terminated-in-January argument.

On March 25, 2014, which is a day after his March 24 deposition in which he testified that he's had extensive communications with Mac email about his inability to access downloaded emails on his own computer, for the first time he sends an email to MacHighway saying I can't access the content in my emails, can you help me? They don't even respond. It's just like a shot in the dark that is intended to support as best he can what he just testified to the day before about having emails that he can't access.

On March 31, 2014, he -- and I would to refer the Court back to Exhibit 14, after this exchange, I direct the Court to -- it's in a later production. In a later communication which I will find and put on the record, he says after it's opened on March 31, he says to MacHighway in an email, "I can't find -- thanks for helping me, I can't find many things in my sent box. Can you explain that?"

So that is more record building. It's record making. It indulges the presumption that they restored everything and now he's looking at it, but things are missing from his sent box. The reply back from MacHighway, and I apologize for not being able to point the Court to this, this is Exhibit 21, your Honor, it's production by Mr. Wood of email exchanges he had

with MacHighway, and it's on Bates stamp number 011.

THE COURT: There's also another place in the same email occurs, which I do think is actually in 10.

MR. SPEARS: There may be a log of it in 10, but I don't think the content is there, your Honor.

THE COURT: You're right, it's not the content in 10, but I highlighted that same language just a moment ago.

In any event, that's the place where it occurs.

MR. SPEARS: In any event, you see on this page Wood 011, it's March 31, 8:04, apparently after everything has been restored, and he says, "Thank you so much for all your help. There are only a few items in my sent items folder. Is there any way to fix this? That would be great." And he indicates, "Thanks so much for your help."

MacHighway comes back with, "Thank you for your support query. It would be unlikely that the sent items are available were they in the manhattanadvisers.com account." So it's impossible to fully comprehend what all the strategy is underlying some of these communications, but it appears that he's uploaded data to the Manhattan Advisers account which has just been reactivated, and he's making a record with an email that his sent items are missing and can they help him with that. So this is another example of a false exculpatory statement on his part intended to support his version of events and his lack of blame.

The last one is May 5, 2004, we just went over that exchange, it's in Exhibit 21 where he says, "This is a serious matter. How can this account be closed? You can't destroy emails during a litigation." He instructed on March 31 that the Manhattan Advisers account at MacHighway should be terminated at the end of the prepaid period in mid April. He knew that would happen, he caused it to happen, and now he is acting as though this is a shock and he's being prejudiced by it.

So each of these, your Honor, we think proves the case that he acted willfully, maliciously, and has relentlessly dug in and provided false answers and explanations with regard to it.

Let me wrap up quickly, your Honor. Let me talk about damages and injury. As you know, and as we made clear, we're seeking a terminating sanction, and we request that the Court strike the defendant's answer and enter a default judgment. We cited cases in our memoranda and reply memoranda where on conduct less egregious than this courts imposed a terminating sanction. Among those are cases where a defendant claim or party claim to have recovered everything and now I destroyed it but now I think I recovered everything, and the Court said forget it, we're not going to -- we're not going to presume that what you claim you recovered is the same thing, and your conduct is bad enough that I'm going to impose a terminating

sanction.

Other cases where the spoliating party has argued look, they haven't proven what it is I got rid of that would have been helpful to them, and the Court said, terminating sanction, we're not going to put the burden on the injured party to try to prove what it is you destroyed, you're really the only one who knows that. So terminating sanction has been employed in cases less egregious than this. It's not controversial. It's fully appropriate here where the conduct has gone on for such an extended period from the time we sent a cease and desist letter through the taking of his deposition, through summary judgment practice, through a motion for spoliation sanctions. It just goes on and on.

THE COURT: So assume for the moment that the plaintiff was able to achieve a terminating sanction, what do you get then that you wouldn't get from just winning on the merits in the litigation?

MR. SPEARS: Well, what we get is not having to go through the burden and expense of trying the case with both hands tied behind our back, because we just don't have the evidence. And I could imagine at the trial, with the denial and new stories and trying to walk through the exhibits and denial and everything, and it would not be productive.

THE COURT: So if you had a terminating sanction, you end up with a default judgment, then the next issue would be

damages.

MR. SPEARS: Correct.

THE COURT: And then you have to have an inquest on damages. And would spoliation play a role in that?

MR. SPEARS: Well, what we request, your Honor, in addition to a terminating sanction, is an award of monetary sanctions against Mr. Wood in the amount of plaintiff's legal fees in this proceeding. Because we have gone through an awful lot in terms of briefing and legal work and efforts to chase down the documents. And given that he started destroying documents from even before we filed the complaint, when we sent him a cease and desist letter, it is an appropriate remedy for Court to impose monetary sanctions on him in the amount of plaintiff's legal fees.

THE COURT: Give me an approximate amount of what that is. Without binding yourself, do you have a ballpark?

MR. SPEARS: I want to check on that, but I know it's been expensive. I know it's been at least $300,000 or in excess of $300,000.

THE COURT: So would there be additional damages on top of that that would be sought by the plaintiff?

MR. SPEARS: It is entirely possible that there would be, your Honor. If we get a terminating sanction and monetary sanctions, I don't think we would seek to prove additional damages. If we did seek to prove additional damages, it would

be in the amount of our legal fees, and I just don't know how we do it.

THE COURT: Let me ask you, did you ask for statutory damages?

MR. SPEARS: We asked for statutory damage, and they're quite steep. So if we sought to do that, your Honor, it would be to have an alternative judgment on the merits, but in the same amount. We want this over. We can't keep spending money on this.

THE COURT: I think at least you and the defendant agrees on that. Everybody I think want this come to an end. And I can actually put myself into that category. One way or the other, this needs to come to an end.

MR. SPEARS: I make this request for terminating sanction with a plea to the Court to stop this. It's just not going anywhere productive. A trial would not be productive, it would be a charade.

And I also ask that the Court find that the sanctions are being awarded for willful and malicious conduct as that term is used in Section 523(a)(6) of the Bankruptcy Code. Damage awards or sanctions awards that are based on a finding of willful and malicious conduct are not dischargeable under the Bankruptcy Act. And we would request that the Court make such a finding in connection with any award that it gives us in this case.

THE COURT: Thank you. What's the -- can you give me the first few numbers of the bankruptcy code to remind me?

MR. SPEARS: Is it 7?

THE COURT: It's one of the low numbers. We'll figure out.

MR. SPEARS: Bankruptcy Code 523(a)(6).

THE COURT: Let me hear from Mr. Naqui.

And Mr. Naqui, at this point, the question is whether we take a short break or whether or not you're likely to finish by noon anyway, and then I will assess how people are doing.

MR. NAQUI: Your Honor, I will say even with a short break, and I request one, that I would be able to finish by noon for sure.

THE COURT: Let's go ahead and take a short break, very short, just to go into the other room and then come back and we'll continue and go until about noon then. I have another matter shortly after that, but since Mr. Spears took some time, we'll make sure that you have the time that you need, but hopefully it will be not longer than what Mr. Spears used.

MR. NAQUI: Nowhere near, your Honor.

THE COURT: Terrific. Let's take a short break. Thank you.

(Recess taken)

THE COURT: Mr. Naqui, you may proceed.

MR. NAQUI: Thank you, your Honor, and thank you for your hearing defendant's arguments today with respect to the alleged spoliation of relevant evidence by my client, Greg Wood. I do have some prepared remarks, and then I would like to run through some of my notes from plaintiff's arguments and respond to those briefly.

Certainly, your Honor, I think the one parties -- or one of the things I think parties seem to agree on, at least pursuant to the papers, is what the appropriate three-part test is that the Court should use to decide with respect to whether Mr. Wood's conduct is sanctionable. And that test is: One, did defendant have control over the evidence and an obligation to preserve it? Two, did Mr. Wood act with the culpable state of mind upon destroying or losing the evidence? And three, is the missing evidence relevant to the plaintiff's claim? Certainly there can be no argument that plaintiff has the burden of proof with respect to these matters, which defendants respectfully submit has not been met.

Certainly as per Mr. Wood's testimony before this Court, he fully understands and is aware that some of the actions he had taken in this case are regrettable and showed poor decision-making, to say the least. Therefore, we do not argue, your Honor, that defendant did not have control over the evidence or that he does not have an obligation to preserve it. Certainly Mr. Wood's sworn statements, deposition testimony,

and testimony at the hearing show that he was wrong in believing that he did not have an obligation to preserve any and all potentially relevant evidence.

With respect to the second prong, however, requiring the defendant to have the culpable sustained of mind, once again, looking at everything in hindsight, we can certainly understand how it would seem that defendant was acting with some sort of malice. But to the extent that Mr. Wood has explained his actions to this Court, while there is no question that he acted irresponsibly, it should not be held that he acted with malice. His explanation for why he deleted emails, which are the crux of the motion before your Honor, which is that he believed that his possession of these emails would continue to generate suspicion with respect to any alleged infringement, is, as I said, consistent and clear, he stated that throughout at any time he was asked.

As he stated, he wanted this lawsuit to end as quickly as possible. Which as your Honor pointed out, is something that seems all parties are in agreement about. And he also made significant efforts, like the motion to dismiss and motion for summary judgment, in order to help get this lawsuit over quickly. Certainly it could be inferred, and not unfairly, that filing those kinds of motion, contrary to plaintiff's arguments, is actually an effort to end the case quicker and to save money, which has been his position from the outset, that

he has two small companies, and he himself did not have the wherewithal to enter what has now become a long and drawn-out litigation.

Afterward he tried to work out a settlement. His explanation regarding the termination of the MacHighway account has also been consistent and clear. He had no idea that terminating the account would mean losing his emails. As he testified, he had previously terminated the Web hosting accounts before and never lost emails because of it. His emails to MacHighway afterwards contrary to plaintiff's position, actually support his explanation, both the email in which he mentions that he can see the email headings but not access the content, and the email in which he asks MacHighway about the status of the emails after he terminated the account in January, which is when he believes he terminated it, support his position that he had no idea that terminating the account would mean losing all of his emails.

The whole situation with MacHighway leaves questions unanswered. At the very least, however, I believe there are reasons to doubt some of the responses provided by MacHighway. As Mr. Saleem pointed out at the hearing, he was able to access Justin Cho's email from his computer and not Mr. Wood's. Plaintiff argues today for the first time Mr. Wood must have somehow uploaded even Mr. Cho's emails onto the MacHighway servers. One, there's no record from Mack MacHighway, as I

imagine there would be if something like that were uploaded, and two, we have had no evidence -- and again, plaintiff has the burden here -- to show that, one, that Mr. Wood even had possession of those emails, and two, that he uploaded them.

THE COURT: Tell me what, in your view, would be MacHighway's motivation to not be straightforward about what happened?

MR. NAQUI: So I'm not taking the position, your Honor, that they have any motivation to not be straightforward. I think this started out as an issue, and certainly MacHighway's counsel said this over and over again where they felt like they shouldn't be involved, they didn't want to have anything to do with it. They took the position that they wanted to be as little involved as possible. I think they responded to the first subpoena and took the position that would be it. And then when both sides started probing with more questions, more and more information came to light that needed to be explained.

The one example I point your Honor to, as Mr. Saleem testified to and also stated in his affidavit, was that they still don't know who the person was that logged in as Amanda M on March 31. It wasn't Amanda M, that we know for sure. We have got confirmation from MacHighway's counsel. But it turns out that -- and we again, didn't find this out initially but only found it out over time as we continued to probe, that the

company that provides the tech support for MacHighway isn't MacHighway, they have a third party that does that. So again, we still don't know who they are, although we asked. We still don't know what the relationship is exactly. But we were provided responsive documents from MacHighway as have now been forwarded and provided to the Court in today's hearing.

So I'm not suggesting, and certainly don't mean to suggest that they had some kind of ulterior motive here. I think at the end of the day they didn't want it deal with and they wanted to sweep this under the rug as quickly as possible. And I believe -- and again, this based on Mr. Saleem since he was the one that dealt with them specifically, but I believe that somebody in that tech support company, that third party, found a way to reactivate these accounts. And I think that the testimony and the evidence that is shown is supportive of that. Unfortunately, that doesn't appear in MacHighway's records, and for liability reasons I could see why it wouldn't, although again, I certainly don't mean to suggest any wrongdoing on their part.

THE COURT: All right. I hear you.

MR. NAQUI: Also there's nothing in the MacHighway evidence provided with respect to what happens when a user activates the C panel. The logs provided by MacHighway have to to with communications back and forth and people who enter ticket numbers and logs that are created from that. I don't

see any logs, and I don't know if any exist when or if a person activates the C panel, which is, from my understanding from Mr. Wood's testimony, which hasn't been controverted in any way, located on Web site control panel I guess is what you call it, where he, according to his testimony, hit a button that says terminate account or whatever it was. There are no logs are evidence with respect to that ever happening. That could certainly mean that it never happened, or it could mean those logs are kept separately or distinctly from the logs that were provided to us.

At this point what I also say is given the way this all came down, MacHighway was asked to provide documentation very quickly in a very short window and short period of time. That may also be a reason why some of these questions still, to this day, your Honor, remain unanswered.

That being said, before I move forward to my next point, I think lastly with respect to the second prong, Mr. Wood's personal situation at the time, which he explained to the Court and which is also outlined in his affidavit, plays a role in this as well. Certainly, as I'm sure we can all appreciate, it could not have been easy for Mr. Wood to sign an affidavit and talk about things like his divorce and child custody issues, failure of his businesses, et cetera, but he did those things to make a showing to the Court while he certainly made mistakes, he did not in any way act with malice.

With respect now, your Honor, to the third prong --

THE COURT: Before you move on to the third prong, why don't you address negligence, because you are aware in the Second Circuit a culpable state of mind can be demonstrated through negligent actions, although that impacts the type of sanctions. So why don't you discuss that.

MR. NAQUI: It's a fair point, your Honor, and certainly I think the key word there is "can." Certainly I think all the case law shows that a lot of this falls in your Honor's discretion based on her examination of evidence and hearing the testimony of the alleged spoliator in this case, Mr. Wood.

But he's admitted to, and I think there's no way to sugar coat or hide it, that he made mistakes. To the extent that those amount to the type of negligence that your Honor would rule are subject to sanctions in this case, certainly our position is that they don't. I think he certainly made mistakes. I think he has made, as I will address a little later in my discussions, significant efforts to address those mistakes and provide whatever emails and evidence that he could, and I feel like he provided everything at this point.

Certainly plaintiff's argument is: How do we know that? I come back to something that counsel stated earlier: You're asking to prove a negative. He is saying they don't exist. He's saying he found everything, and he's saying that

everything that he may have deleted would have been copied -- Mr. Cho would have been copied on, so when they were finally able to access Mr. Cho's email, Mr. Saleem was able to provide whatever emails that may have been deleted.

THE COURT: But he did testify -- I specifically asked him whether or not certain types of individualized communications would have been copied to Mr. Cho, and I believe he said no. For instance, the ten or so last emails that went to the large distribution list in some undifferentiated fashion, those might have been in Mr. Cho's email, but if there had been individualized communication, I think he testified that would not have been.

MS. NAQUI: I think if you give me a second I could grab the transcript and we can have a look at the testimony.

THE COURT: Yes.

MR. NAQUI: So we were looking your Honor, page 97 of the transcript from the hearing, and there was a point -- and you're correct, where you said to Mr. Wood, "You didn't restore world as it existed?" And he said "Yes, that's right." And you said -- your question was, "You restored access to MacHighway and you paid for MacHighway," and his response, "That's right." Next question, "Not Justin Cho's emails that which, for whatever reason, have not been deleted." He said, "That's right." Now your question, the important one, "Is it your testimony that because Justin Cho was copied on

everything, therefore everything was maintained?" His response was, "Yes." He did go on to explain, however, he wasn't copied and everything, but he was copied on those things, the RFG reproduced material that was distributed, but not every single email that was sent out. So I think to the extent that -- what that does say, your Honor, is there are a lot of unrelated RFG material that he would have been copied on.

I would also like to point out, your Honor, that what was provided to of plaintiffs, there are numerous emails, individual emails between Mr. Wood and other individual parties that may have been interested in either helping market the product or be involved in some way with respect to this Pathfinder product.

So I think Mr. -- my understanding of the testimony is that Mr. Wood's position is that those are it, that what has been provided is it, that we have been able to access -- that the only things that he recalls deleting were these larger emails that contained this issue, these larger group emails, and he believes that between what he was able to access when the MacHighway account was restored and what he was able to access through Mr. Cho's email, he believes he has everything, and certainly will admit that doesn't necessarily mean that he did find everything. I guess not, but there's no way to prove it. There's no way to prove the negative that he doesn't. Certainly he made -- I think the important point I'm making

here is that he has made significant efforts to correct his wrong, and that I should be taken into account with respect to certainly the second prong.

So moving forward, your Honor, to the third prong, which requires that the alleged missing evidence be relevant to this matter, I think this is a key issue. And a proper analysis of this issue requires that we look at the context of the case itself and the relevant position of the parties. What we have before us, your Honor, as your Honor very well knows, is a copyright infringement case against two small companies owned by the same individual who had no more than a couple of part-time contractors working for him at any given time.

THE COURT: Well, let me ask you, as I understand the chronology, and I may not have a perfect understanding of the chronology in terms of the early history of the case, which is a matter about which we have not spent a great deal of time in the context of this motion, Manhattan Advisers really came into existence not necessarily because of the deal with Regulatory Fundamentals, but not too temporally distant from the deal, if you will, with Regulatory Fundamentals, and it was incorporating -- well, I guess, number one, is that right?

MR. NAQUI: To be honest, your Honor, I couldn't tell you exactly what the chronology was in terms of how close in time Manhattan Advisers was created. I thought from my recollection, and certainly it's just a recollection at this

point, I thought it had existed for some time prior to the deal being made. I thought the issue was, and probably still is, whether or not Mr. Wood had the right to market, quote, unquote, these materials on the Manhattan Advisers account.

THE COURT: Let me tell you where I'm going. I'm trying to figure out in terms of relevance whether there's any real delta between Manhattan Advisers and all communications with potential customers of Manhattan Advisers had and its deal with RFG. In other words, if its primary communications, at least for some period of time, whether it's the beginning of the company or not actually is sort of irrelevant, let's assume during some period of time subsequent to the deal with Regulatory, Manhattan Advisers' primary communications with its hoped-for customers is utilizing the regulatory material as a primary marketing effort, then one would think that everything flowing in terms of marketing efforts through Manhattan Advisers during that period of time could be relevant.

In other words, let's put it in terms of what the plaintiffs are saying, if what they're doing is misusing the information for a period time, if the information is the primary marketing efforts during that period of time, then one would think that all of the emails are potentially at least one or way or the other relevant to the claims in the lawsuit.

MR. NAQUI: What I would argue, your Honor, is we're dealing with a copyright infringement case, so the issue is

whether or not he sent it out. And if they're seeking statutory damages, certainly each time he did, and I think there's an issue of whether each individual email to each person on the BCC or each individual itself counts as an instance for the purpose of statutory damages.

THE COURT: Or lost profits. An alternative way would be lost profits. So for instance, to take the most nefarious potential example, if he sent out an email to RFG's customers saying I can do this for you and I can do it better and I can do it cheaper or more cheaply, and a few of them respond and say hey, we're very interested in that, give us some pricing, and there was some back and forth on that. And let's assume for the moment that that company ended up terminating its relationship subsequently with Regulatory Fundamentals perhaps because of that, perhaps for a totally unrelated reasons, they might be able to claim some lost earnings stream.

MR. NAQUI: So my understanding of the complaint is that it doesn't -- is that that's not the argument that is being made. My understanding of the way the system was supposed to be set up is that Mr. Wood would be, quote, unquote, I guess marketing these products using his own name, but that if anybody wanted to subscribe to Pathfinder, which they would find out about through Mr. Wood's marketing, it would still come through them, and he wasn't offering it -- there was no way they could purchase it at a different price.

The purchasing mechanism, my understanding is, was still through Regulatory Fundamentals, through the plaintiff.

THE COURT: So that lost profit theory -- I'm just trying to speculate, Mr. Spears, it's up to Mr. Spears, but I hear what you're saying in terms of this all goes back to the question of relevance. And my suggestion to you was unless there's some major marketing effort apart from the utilization of these materials, then arguably all the emails could have been relevant.

MR. NAQUI: Right. So my response would be, your Honor, that, if I'm understanding you correctly, again, that if the lawsuit is about copyright infringement, removal of a copyright illegally, adding another copyright onto a product illegally, the only relevant issue with respect to damages, if what we just discussed about in terms of their lost profits doesn't apply, is statutory damages.

So the question becomes: Did he do it? Now certainly there's enough evidence that has been provided to plaintiffs, and they're not making an issue of in today's hearing that he did do it. He's admitted to -- and there's evidence of that was provided to them -- him forwarding these emails to his customer list. There's evidence of him putting it on his Web site, which potentially they could argue, should they chose to do so at any sort of an inquest or damages trial, that that would have garnered more views or hits than an email going to

400 or 500 people.

THE COURT: Go ahead.

MR. NAQUI: To finish the point, if Mr. Wood has admitted and evidence has been provided to the plaintiffs of what exactly was put on Web site, and the evidence also shows that what was put on Web site is what was forwarded to all of these people on the customer list, I understand Mr. Spears' position they didn't want to see the customer list, but in my opinion that's the most relevant thing is who is on that customer list.

And if at the end of this litigation, however it is to end, if they're right, then those people will have to be notified that they may have received certain materials that were in violation of a copyright, and that they should destroy or remove those documents or those materials immediately. Outside of that, I don't see what other purpose there is of getting any other emails, if there are any. And again, Mr. Wood's position is that there aren't, but if there were any others, I don't see what they're going to get from them.

THE COURT: Well, I will let Mr. Spears address this, but just to get your response, with statutory damages, of course with the Copyright Act there are two types, there's base statutory damages and statutory damages for willfulness.

Among the kind of factors that a Court takes into account for a willfulness finding, and I should say a finder of

fact, because sometimes that's a jury question, are things such as the number of instances. And while one award of damages is due for each copyrighted work, the number of times that particular copyrighted work has been infringed goes to the question of willfulness. There can be other types of conduct which potentially could inform the willfulness question.

So just to push back on your argument, what if these emails said gee, I just saw the same stuff from Regulatory, are you working for them? And if he wrote back and said no, I give them my work regularly and get paid a fee, so he is sort of building himself up in front of his potential customers, that might go to the willfulness aspect. Again, I have no idea what these emails say, but that's sort of the point.

MR. NAQUI: I understand, your Honor. My response certainly would be that it comes back again to the agreement in and of itself, which has been Mr. Wood's defense from the beginning. Either the conduct that he has admitted to is copyright infringement and the agreement doesn't protect him, or the agreement does protect him. And that even if he were to say something along the lines of what you just suggested, that arguably could be protected by the agreement as well. We just don't know, but that's an affirmative defense issue.

And I would also argue that the question of willfulness, even in the context of statutory damages, although a factor -- certainly the factor of how many times it was sent

out certainly exists, I will argue that in this case, the main factor would be whether or not Mr. Wood had reason or reasonably believed that the agreement allowed him to do what he was doing.

If a judge or a jury, finder of facts finds that he did, I argue that the willfulness finding could be made in his favor, that he wasn't willful. Which, again, I think strangely enough comes back to today's hearing as well, which is Mr. Wood's testimony has been consistently that, one, he believed what he was doing with respect to the content prior to when the lawsuit was filed was within his bounds, and certainly he believed -- and this part wrongfully -- that because of the constant notifications he was receiving, whether in writing or at a deposition, that he may have somehow been still responsible for this, he wanted to remove that suspicion, as I stated earlier, by getting rid of emails.

Again, it was the wrong thing to do. He knows he made a mistake. I think very credibly and in front of the Court he testified to that, and he regrets his actions, but he certainly did, I point out, make significant efforts to rectify and correct the mistake that he made.

Your Honor, I want to address for a little while what Mr. Saleem proffered to the Court, and the fact that additional discovery was provided to the plaintiffs after the motion was filed. Contrary to plaintiff's contention, the fact that I

think Mr. Saleem's proffer very clearly showed that the failure, and it was a failure by defendants, to provide certain evidence prior to the motion being filed was simply a mistake on his part.

I don't think he was -- I know Mr. Spears didn't use this term, but I will, a puppet, Mr. Saleem, and that he was conned or fooled into doing this. I think his proffer to the Court and his affidavit are also very credible in that he has certain issues himself as an attorney, as an officer of this Court, he has certain issues with MacHighway's responses to his questioning and to document requests. And those led him to believe that the account actually was reinstated and the emails were made available after March 31st. And again, I won't speak for him, but it's in the record of what his contentions and beliefs were with respect to what happened.

Your Honor, in conclusion -- I won't say in conclusion, but after this short conclusion I will head into some of my notes about plaintiff's motion papers and oral arguments here today put the focus squarely on Mr. Wood's conduct, which they interpret to be in bad faith. They point to the fact that he is a Cornell Law graduate, but don't appreciate the fact he was never a litigator nor ever been involved in a litigation outside of a personal divorce.

They pointed to his refusal to waive the attorney-client privilege and allege that this should have

created a negative inference. Certainly the refusal to waive that privilege, in my opinion, should not have created any negative inference, given how hallowed and privileged it is. But more importantly, based on the Court's urging, we did, to erase any iota of any doubt, go ahead and agree to a limited waiver of privilege, which hopefully has resolved any concerns raised by that issue.

To the extent that we have been able to explain that Mr. Wood's actions were a result of making poor choices, as opposed to intentionally seeking to prevent plaintiff from obtaining evidence, we ask your Honor to consider same when making your decision.

I think that raises an important point that I wanted to expound on a little bit based on some of the things that the plaintiffs have argued here today. There are a number of, in my opinion, questions that are left unanswered. If the picture that was painted today is an accurate one, and that picture being that this was some kind of a long and drawn out and well crafted with tremendous incredible foresight plan by Mr. Wood to spoliate or destroy evidence and somehow protect himself, as I already argued, I don't think it protects him at all.

He's already admitted to putting the stuff on his Web site. He's already admitting to sending out at least ten emails to at least 400 people. So if that is infringement, which I know is still an issue yet to be decided by the Court,

but if that is, he admitted to it.

Again, will be a willfulness argument, but with respect to the statutory damages of actually doing it, he admitted to it. To what that amounts to in terms of actual dollar money, it probably amounts to more than what plaintiffs have already said they would be willing to take in this case to have it end now. So I don't see and I don't think there's been any showing of what he really would have gained or has gained by doing this.

More importantly, there's a lot of questions unanswered with respect to how he executed this alleged brilliant plan of sending fake emails to people saying things just to set up a story and so on and so forth. If he was looking to delete emails, it shouldn't have been so hard to get all of them. Given today's technology, it shouldn't be all that difficult to simply delete them all if that's what he really wanted to do. But I think he's been very credible in testifying that, one, he's not that technically proficient, but two, that all he did was just go through and delete what he thought were emails that were at that time -- and granted, hindsight being 20/20, he realized now was a mistake -- but at that time were actually hurting him.

If we're talking about something he did April, May, June of last year, and then bringing it back again to things that happened in January, February, March of this year, and

April of May now and June, certainly if this was some part of nefarious plan, he would have done a better job, quite frankly, than the evidence shows that he did. But that actually leads me to believe that this wasn't part of any nefarious plan.

Something counsel said earlier when he was reviewing what he thought were, quote, unquote, record making exercises by Mr. Wood, he said it's impossible to fully comprehend what the strategy was or is. My response would be that's probably because there is no strategy, that look, he's already admitted to doing something wrong, why admit to it and then go through some kind of half-hearted exercise of deleting potential emails that may or may not hurt him more than the amount that he's already hurt? It's not as if there could be even -- there's only a finite number of copyrighted material, so it's not as if there were more than ten and closer to 20 or even five or ten more individual e-mails or even hundreds of more individual emails that are still contained in the finite material that is finite and laid out in the amended complaint. I don't see how it could -- I don't see how he was protecting him himself in any way, and I don't see how -- I guess the point I'm trying to make is it takes away from a finding of malice if the fact that he admitted to doing what may or may not be copyright infringement depending on what the Court finds later on.

THE COURT: Although I don't think that has ever really been in doubt, really. Since the very beginning of the

case the defense has always been, from well before the time spoliation even came to Court's attention, it's always been that he certainly sent out materials from Regulatory Fundamentals and he certainly sent them out without attribution, but that he believed he could do so.

So I don't think that the fact of infringement has ever been a viable defense, or non-infringement has been a viable defense, it's if in fact his reading of the contract is wrong. So he's always bet on his reading of the contract, if you will, or a settlement, and I think it's more the latter than the former.

MR. NAQUI: I would argue it's just as much the latter or the former. I think the settlement discussions, based on his own testimony, were based on the fact when he wanted this to end, that he was willing to give up the fight so this could end, he could not have to pay for legal counsel anymore, and all the other costs associated with litigation, and frankly, move on with his life and close down two businesses. And now he has another job, which the Court is already aware.

THE COURT: What's he doing these days?

MR. NAQUI: I think he's in finance. I have to ask him exactly.

THE COURT: He's not acting as a lawyer?

MR. NAQUI: I don't believe so. I don't believe so, but I could certainly confirm that for your Honor if it's

relevant.

THE COURT: What other points did you want to make?

MR. NAQUI: Give me one second, your Honor.

So there were assertions made about Mr. Wood opening another domain in April. What I would say with respect to that, and certainly unfortunately Mr. Wood isn't here to testify or be questioned about it, but that information was available to -- at least the fact that this domain was opened was available to the plaintiffs at the hearing. He wasn't questioned about it. There's no evidence on the record with respect to it. I don't think it's fair to make any presumptions or assertions one way or the other with respect to why he did it, whether it has anything to do with anything related to this case since he was never questioned about it and given an opportunity to explain.

I will speak quickly to plaintiff's counsel's comments at the end with regard to damages and injury. I think your Honor was absolutely right in saying look, all parties want this case to end. This issue of willfulness seems to have come up again now with respect to counsel's request that Mr. Wood's actions be deemed willful with respect to the appropriate and relevant sections of the Bankruptcy Code. Certainly obviously we'll oppose that. But it does, in my opinion, provide an explanation of why we're here, maybe because I think that was the amount that would have settled the case, and I know it's

not evidence, but it would have settled the case months ago.

I certainly don't believe that the record reflects plaintiff met their burden that Mr. Wood's actions were willful. Also at the same time I will state that I have certainly gotten no indication from him that he's looking to file for bankruptcy or anything, but I understand plaintiff's caution with respect to the issue.

I do think this matter should be settled. I think everyone is in agreement on it. I wish we could put this behind us and come up with a number that makes sense and have the case go away. That's been my client's position for quite some time. I know to the extent that those 400 to 500, whatever the number is, of people who are on Mr. Wood's email list or Manhattan Advisers' email list, to the extent that as part of the resolution of this case they would need to be notified, I don't think my client would have any problem with that, assuming the language is appropriately worded, if this is resolved out of court, but to put on the record I don't think that would be an issue.

And I think that also goes to show and prove that if he's willing to give you the list, willing to show you anyone added or deleted from the list in whatever time period the plaintiff would be looking for, I imagine going back from the date the contract was entered into, my client is willing to provide that as a resolution.

I guess last but not least I point out the case law is also very clear that your Honor has broad discretion in these types of cases not only with respect to making a finding of spoliation but also with respect to what is a fair and equitable resolution. Certainly to the extent that counsel is arguing that terminating sanctions are fair and equitable here, and I think Mr. Saleem's papers argue the point well, I certainly don't think this is a case where that is deserved. I think there are a number of issues of fact that are relevant with respect to defendant's defenses that have nothing to do with whether or not any emails were allegedly spoliated. So that as a -- certainly as a potential resolution I don't think makes sense in this case.

I do believe, as opposed to a monetary sanction, although I think most of the cases that discuss this issue discuss it in terms of a kind of a last resort resolution for courts, but I think it's more appropriate in this case for some kind of -- if this case does go to trial, some kind of jury instruction with respect to this issue, certainly one that would have to be discussed and agreed upon. Or if your Honor were to decide on it, however she would make a ruling, but that actually might be a more fair resolution given the fact that Mr. Wood has admitted to providing or sending out these e-mails, something along the lines of -- I'm honestly thinking off the top of my head, but something along the lines of any

emails or any copyrightable content that any evidence indicates that Mr. Wood has forwarded to his list or that he has forwarded at all can be assumed that it went to everybody on his list. Something along those lines with respect to calculating damages, I don't think my client would be adverse to that either, just as another way of potentially resolving it.

Thank you very much, your Honor.

THE COURT: Thank you.

Mr. Spears, we're already over time, but if you had a couple of things to say, pick your best and --

MR. SPEARS: I have two.

THE COURT: All right.

MR. SPEARS: First, I direct the Court's attention -- I make this representation on the record, the Exhibit 14, landscaped, page 2 of 11 at the top, it indicates that the manhattanadvisers.com domain and hosting account were opened, that the 9/19/2012, I note the amended complaint alleges that the agreement was entered into on October 30, 2012, and that various papers that have been filed with the Court previously indicate that there was a run-up to the agreement being signed, including extended negotiation. So it appears Manhattan Advisers was created at the same time as the dealings with RFG that led to the entry into the agreement.

And then finally you asked the question, your Honor,

about whether we can -- how we can know that the new account that Mr. Wood opened is reflected in the log, Exhibit 10, is the start-up survivor account. And I will state this on the record and documents will support it, the exhibits will support it. There's an entry on the log for April 12, 2014 that indicates an invoice was issued for 286888, that's the number.

And then I direct the Court to Mr. Wood's production, which was the first time we learned about the start-up survivor account, Wood 022, they terminated his start-up survivor account on June 6, just basically pushed him out the door.

If you go to Wood 028, they're informing him as to the amount of credit he's getting, and they have got the start-up survivor, April 12, 2014 to April 11, 2015 with the initial scheduled date, and they pro rate and give him back money. And they have an invoice number 286888, which is the same invoice number that we see for the log entry on April 12 in Exhibit 10.

Your Honor, thank you for all your time on this.

THE COURT: Sit down for one second. I don't want to cut you off for your last statement, I saw Mr. Naqui getting up, I want to make sure you don't leave yet.

MR. NAQUI: I'm not leaving, your Honor.

THE COURT: Mr. Spears, were you done?

MR. SPEARS: Yes, I was, your Honor.

THE COURT: So here is what the way in which we're going to proceed. I am going to give you a bottom line ruling

right now, and I am then going to draft a thorough opinion. Because the case is not over, it's not yet an appealable order, but I don't think that Mr. Wood's plan was such a brilliant plan. I think that it happened in dribs and drabs, but unfortunately that is not inconsistent with spoliators because bad judgment can lead to poor execution of a plan.

I do find that there has been spoliation of relevant evidence with the requisite culpable state of mind. Indeed, I find it was willful and malicious pursuant to the Bankruptcy Code Section 523(a)(6).

I understand that -- and Mr. Naqui, I have to say I think you argued this about as well as it could be argued, and I would not expect that you would ever make any concessions as to willfulness or malicious conduct, and so the fact that you have raised those questions which one could draw competing inferences is exactly what one expects from highly competent counsel.

I, however, draw the other inference, and I will lay out those various factual points and the inferences that are drawn. I would say that in my view the evidence is clear, it's convincing, and indeed it's distressing. We've got this fellow who is very intelligent, articulate, he was a Wachtell associate. This is not the kind of fellow who should not have clearly understood what was going on. Indeed, I find that he did know what was going on.

Whether or not he deeply regretted things and was trying to dig himself out of a hole here and there, the realty is I think he knew he was destroying documents when he destroying them that he shouldn't be doing it, but he was trying to fix what he thought was a bigger problem that he could eliminate, then he wanted to settle to try to put a cover over it, and it just got frankly worse and worse.

There were, in my view, at least three instances of spoliation as groups, three groups I should say. One was the manual deletion, the second was what I call the first MacHighway deletion of account, and the third was the second MacHighway deletion of account.

So if there was ever any question as to which way the inferences should be drawn, the second MacHighway deletion is just devastating, because there's no way in the world that an intelligent person wouldn't have, the day that the account was allegedly put back into existence, which I'll talk about in my opinion, I don't think it was put back into existence in any real way, boy, you make sure that you had done everything possible to have it held on to.

But in any event, I do think that he acted, as I said, willfully and maliciously. I think that the plaintiffs have well and truly exceeded the burden of proof which they have to carry. And I will lay it all out, but I do find that the missing information -- while some of it was produced, the

missing information was plainly relevant. Whether or not it would be admissible at trial, I don't know, but the question of relevance in terms of spoliation doesn't mean it has to be a dagger to the heart of the plaintiff's case, it means it has to be relevant, and under the rules of discovery, it certainly is.

So that is my finding on the motion. Plaintiff's motion is granted. I will put forward my determination as to nature of sanction in the decision, in the written decision. I need to go through a number of different cases in this area and really study the way in which the sanctions have been devised.

I am seriously considering a terminating sanction, but I am not ready to have that in an order. I say that because if there's any chance that the defendant would like to try to settle this matter, he can attempt to do so. This order will be reflected in a one-paragraph order that would go -- if the plaintiff is inclined, the order on spoliation will go up today as a one-paragraph order, but the decision will follow.

This is a fellow who -- there are serious implications to his law degree for having a written decision that will say what it says. I say that not to in any way suggest that he should do something he doesn't believe he should do. If he wants to then take my decision up on appeal and seek vindication in that manner, that is, of course, his right. I say it only because you can then convey to your client that the Court did say this. I will tell you it will take about two

weeks to write the decision, but it won't take much longer than that because I know what I am doing over the next week, and it will be in the queue after that.

So the motion has been decided but the decision will lay out the nature of the sanction itself as well as the rationale, and I don't see any prejudice flowing from the lack of the rationale being fully stated right now on the record in light of the fact it's interlocutory at this point.

I want to thank counsel for very well argued papers. Things were frankly a bit of -- they were all over the place, Mr. Naqui, until you came into things, frankly. So it's your, I think, articulate presentation of the best defense that could be provided here was quite a breath of fresh air.

Let me say one more thing, which is -- and I will have to figure out how I deal with this in the decision -- I don't find there to be much of a close call about the interpretation of the contract. The procedural way in which the prior motion was brought forward did not pose the question in a way that would have allowed the Court to have granted summary judgment to the plaintiff at that time on exactly all of the issues. I think there were some but not others. And I think the defendant moved for summary judgment, that was context.

MR. SPEARS: Yes.

THE COURT: So if the plaintiff moved for summary judgment, I think the contract, in my view, is relatively

straightforward on its face. So the idea this could have been -- and if a Wachtell corporate associate, and I'm not focusing on the firm so much --

MR. SPEARS: I'm so sorry to interrupt, but on behalf of my friends at Wachtell, he was at Orrick Herrington.

THE COURT: Orrick Herrington. I knew it was a major national firm. So he's at a major national firm, he went to a very good law school, he's articulate and smart, which is more important than what firm he was at or what law school he went to, he clearly is articulate and intelligent. I can't believe he believed in that interpretation of the contract.

But that finding doesn't -- that's not a finding because he did not testify to that, and the Court's decision on the spoliation motion is not based on a determination as to his personal state of mind with respect to that one issue about his interpretation of contract. I, as a legal matter, think it's clear, and I have lots views about his state of mind otherwise.

All right. So that's where we'll stand. I will issue that longer opinion, but the order is as it is.

Thank you. We're adjourned.

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